

DECISION



29352
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-215106

DATE: September 18, 1984

MATTER OF: Litton Systems, Inc., Electron Tube
Division

DIGEST:

1. In negotiated procurements there is no requirement that award be made on the basis of the lowest cost. The procuring agency has the discretion to select a higher rated technical proposal instead of a lower rated, lower cost proposal if doing so is consistent with the evaluation scheme in the solicitation. Consequently, the protester is not automatically entitled to award merely because it had the lowest proposed costs.
2. Where a solicitation does not indicate the relative importance of the technical versus cost evaluation, it must be presumed that technical and cost considerations will be approximately equal in weight. GAO finds that under the solicitation's evaluation scheme, the technical aspects of the offerors' proposals and the cost aspects of the offerors' proposals were to be given equal consideration.
3. Procuring officials enjoy a reasonable degree of discretion in the evaluation of proposals and GAO will not disturb the evaluation unless shown to be arbitrary or in violation of the procurement laws and regulations. GAO finds that the agency's technical evaluation of the protester's proposal was reasonable.
4. A firm, fixed-price contract is not subject to adjustment based on the contractor's cost experience during performance and, thus, places full responsibility, in terms of profits or losses for costs above or below the fixed price, directly upon the successful offeror. GAO questions the agency's adding \$200,000 in

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costs for in-house effort to the protester's low, firm, fixed-price offer as part of the agency's cost realism determinations.

5. In negotiated procurements, an award to a firm offering a foreign product at higher price can be made if the foreign offer is evaluated as the best offer considering the combination of price, the Buy American Act price differential, and technical approach.

Litton Systems, Inc., Electron Tube Division (Litton), protests the award of a contract to Thomson-CSF Corporation (Thomson) under request for proposals (RFP) No. SA-83-SPB-0025 issued by the Department of Commerce (Commerce). The RFP was for the development of one prototype and two preproduction models of a wideband Klystron tube with an extended tuning range for use in weather radar.

Litton contends that by making an award to Thomson, Commerce accorded more weight to technical factors than cost contrary to the award criteria as set forth in the RFP. Litton also contends that Commerce improperly evaluated its technical proposal. Finally, Litton contends that Commerce misapplied the Buy American Act (41 U.S.C. §§ 10a-d (1982)) and its implementing regulations in evaluating the cost of the foreign-made Klystron tube offered by Thomson.

We sustain Litton's protest. Although the RFP contemplated a cost-type contract, Litton and the other offerors proposed on a firm, fixed-price basis. Commerce improperly added Litton's in-house costs of development to its low firm, fixed-price offer.

Background

The RFP was issued on August 26, 1983, and required that the tubes to be developed had to be mechanically and electrically interchangeable with a particular Klystron tube manufactured by Varian Associates (Varian) that was in current use in the Federal Aviation Administration's radar systems. The RFP also specified that the preproduction tubes had to be supplied for use in validation testing.

At the September 26, 1983, closing date for the receipt of initial proposals, Commerce received offers from Litton, Thomson, and Varian. The initial evaluation by Commerce's source evaluation board (SEB) placed all three offerors in

the competitive range. The SEB then addressed a series of written technical questions to the three offerors in order to clarify certain aspects of their proposals. The offerors' responses to these questions were received on December 22, 1983. The responses were then considered by the SEB in its final evaluation, which was conducted in January 1984.

On February 14, 1984, Commerce amended the RFP to provide for multiple awards. Commerce's source selection official then approved the selection of Thomson and Varian for award. A contract was awarded to Varian on March 19, 1984.

Commerce notified Litton on April 2, 1984, of its failure to be selected. Litton protested the selection of Thomson to Commerce on April 3, 1984, which was denied by Commerce on April 19, 1984. On the same date, a contract was awarded to Thomson and Litton thereafter protested to our Office.

Award Criteria

Litton contends that Commerce improperly made the technical aspects of the offerors' proposals more important than the offerors' proposed costs. Litton points out that paragraph M.4 of the RFP provided that award would be made to the offeror determined to be within the competitive range whose proposal was technically acceptable and whose technical/cost relationship was the most advantageous to the government. In Litton's view, nothing in the RFP's award criteria made technical more important than cost. Litton argues that its proposal was technically acceptable and in the competitive range. Finally, Litton asserts that its technical/cost relationship was more advantageous to the government than Thomson's because its proposed costs were significantly lower than Thomson's.

Commerce takes the position that Litton's proposal was evaluated in compliance with the RFP's stated criteria, but that Thomson's proposal presented a more advantageous technical/cost relationship. More specifically, Commerce states that the decision not to award to Litton was a technical decision based on its analysis that Litton's proposal represented substantially greater risk regarding the completion within a restricted period of time of the RFP's required developmental work.

In this case, the RFP provided that an award would be made on the basis of the most advantageous technical/cost relationship without explicitly indicating the relative importance of cost versus technical evaluation. We have frequently held that where an RFP does not indicate the relative importance of the technical versus cost evaluation, it must be presumed that technical and cost considerations will be approximately equal in weight. Development Associates, Inc.--Reconsideration, B-205380.2, B-205380.3, Mar. 28, 1983, 83-1 C.P.D. ¶ 313; University of New Orleans, B-184194, May 26, 1978, 78-1 C.P.D. ¶ 401; 52 Comp. Gen. 686, 690 (1973). Consequently, we find that the RFP's award selection criteria provided for equal consideration to be given to the technical cost aspects of proposals.

Technical Evaluation

Litton contends that in evaluating its proposal, Commerce failed to take into consideration the "superior experience" of two of its design personnel who originally developed the Varian Klystron tube. Litton also contends that Commerce did not give it credit for proposing much more stringent specifications for finding minute tube leaks than either Varian or Thomson. Litton further asserts that Commerce wrongfully refused to consider the experience that the Navy had with its L-3742 tube which, except for "minor changes in the electron optics," operates at a 6-microsecond pulse length like the Varian tube. Finally, Litton argues that by emphasizing that Litton was not currently producing the Varian tube and, thus, could not meet the RFP's 18-month development schedule, Commerce overstated the difficulty in developing the required tube. Litton alleges that one of its design personnel led the Varian development team in 1968 and developed the Varian tube in less than 1 year.

The determination of the relative merits of a proposal, particularly with respect to technical considerations, is primarily a matter of administrative discretion. Dynamic Science, Inc., B-188472, July 20, 1977, 77-2 C.P.D. ¶ 39. Our function is not to evaluate anew proposals submitted and make our own determinations as to their relative merits. Houston Films, Inc. (Reconsideration), B-184402, June 16, 1976, 76-1 C.P.D. ¶ 380. That function is the responsibility of the contracting agency, which must bear the burden of any difficulties resulting from a defective evaluation. MacMillan Oil Company, B-189725, Jan. 17, 1978, 78-1 C.P.D. ¶ 37. In light of this, we have repeatedly held that procuring officials enjoy a reasonable degree of discretion

in the evaluation of proposals and that this will not be disturbed unless shown to be arbitrary or in violation of the procurement laws and regulations. Piasecki Aircraft Corporation, B-190178, July 6, 1978, 78-2 C.P.D. ¶ 10.

Additionally, the protester has the burden of affirmatively proving its case. C.L. Systems, Inc., B-197123, June 30, 1980, 80-1 C.P.D. ¶ 448. The fact that the protester does not agree with the agency's evaluation of its proposal does not in itself render the evaluation unreasonable. Kaman Sciences Corporation, B-190143, Feb. 10, 1978, 78-1 C.P.D. ¶ 117.

The RFP's technical evaluation criteria provided as follows:

"1. Technical proposals will be evaluated in accordance with weighted evaluation criteria to determine the relative merits of the offeror's proposal. The Government will assign a numerical score to the results of this evaluation.

"2. The criteria to be used for the technical evaluation are as follows:

"A. Technical Development Factors to include:

Completeness of the proposed product specification
Completeness of the Development Plan
Completeness of the Test Plan approach

"B. Management Factors to include:

Corporate experience
Personnel experience
Prior schedule/cost performance.

"C. Schedule Factors to include:

Duration of the proposed effort
Completeness of milestone and activities descriptions

"D. Production Factors to include:

Current capability to produce high powered S-band Klystrons.

"3. The relative order of importance for the technical criteria is as follows: Criteria 2.A is most important and is weighted slightly more than the sum of the values for Criteria 2.B and 2.C, which are approximately equal in weight. Criteria 2.D is the least important and is weighted slightly less than either of Criteria 2.B or 2.C."

The record reveals that the SEB found that Litton's proposed development plan was clear and very unambiguous. However, the SEB also found that while Litton's development plan was logical and complete, Litton's product specification was incomplete. The SEB further noted that Litton's development plan was very ambitious, given the extensive development Litton would have to undertake in order to produce a basic tube equivalent to the Varian tube and then modify that tube for increased band width. The SEB recognized that although Litton was an experienced, well-established manufacturer, there was a substantial risk that the company could not meet the development schedule in view of the fact that internal development of the Varian equivalent tube had been barely begun by Litton.

In our opinion, the technical evaluation of Litton's proposal was reasonable. The record indicates that except for receiving substantially less points because of the extensive tube development that would be required, Litton received nearly the same technical score as Thomson in the area of technical development. Essentially then, Litton received a lower technical score in the evaluation areas of corporate experience and current capability to produce because the SEB felt that Litton would first have to develop a tube equivalent to the Varian tube before the company could undertake the task of modifying such a tube to meet the RFP's requirements. In contrast, the record shows that Thomson acquired a license from Varian and has been working for some time to produce an equivalent of the Varian tube. With respect to Litton's assertion that the board did not take into account Litton's experience in developing its L-3742, Litton has not furnished any support for its allegation that except for minor optics changes, the L-3742 is the equivalent of the Varian tube. Therefore, we find that Litton has failed to meet its burden of proof on this allegation. See C. L. Systems, Inc., B-197123, supra.

Cost Evaluation

Litton contends that Commerce did not properly evaluate the offerors' costs. Litton argues that while a cost realism analysis may be appropriate where there is the opportunity for considerable cost overruns, Commerce's cost realism analysis was inappropriate here, where Litton and the other offerors offered firm, fixed-price contracts and, thus, assumed all the risk of cost overruns. Litton alleges that it offered a fixed-price contract because it considered the possibility of a cost overrun to be minimal in view of the expertise of its technical people.

We agree with Litton that a firm, fixed-price contract is not subject to adjustment based on the contractor's cost experience during performance and, thus, places full responsibility, in terms of profits or losses for costs above or below the fixed price, directly upon the successful offeror. See National Veterans Law Center, 60 Comp. Gen. 223 (1981), 81-1 C.P.D. ¶ 58.

The RFP provided that the use of a cost-plus-fixed-fee contract was anticipated for the development effort. However, the record shows that the SEB noted after receiving fixed-price offers from the offerors that a fixed-price contract was the "preferred award instrument" even though the RFP made no reference to this type of contract.

The record shows, however, that the SEB analyzed all three offerors' costs to determine the "true costs of the development effort to the individual contractor." The SEB found that Thomson's true development costs were \$174,105, compared with its best and final offer of \$172,550. With regard to Litton, the SEB determined that the true development costs were \$310,000, even though Litton's best and final offer was only \$110,000, because the \$200,000 difference represented the funds being spent by Litton to develop in-house an equivalent to the Varian tube. In addition, the record shows that the SEB criticized Litton for not providing the labor hours associated with Litton's in-house development effort. As a result of the SEB's cost analysis, Varian and Thomson were ranked first and second and Litton was ranked third.

Furthermore, Commerce admits that the Buy American Act applies to Thomson's offer since the company is a French firm offering non-American supplies. Commerce further states that in order to ensure that Litton's technical/cost

relationship had been evaluated fairly, a 6-percent cost adjustment factor prescribed by the Buy American Act regulations was added to Thomson's evaluated costs. Commerce declares that even with the additional price differential between Litton and Thomson, it was still determined that Thomson's proposal presented a more advantageous technical/cost relationship than did Litton's offer.

We fail to understand the SEB's ranking Litton third since Litton's \$110,000 offer on a fixed-price basis was significantly lower in terms of cost to the government than Thomson's. While the RFP did provide that both development costs and production costs would be evaluated, development costs were of "primary importance" in the evaluation. Therefore, we feel that there is doubt as to whether Litton's costs were properly evaluated by Commerce. We conclude that despite the technical superiority of Thomson's proposal, the record does not support the award to Thomson in view of the significantly lower fixed price offered by Litton.

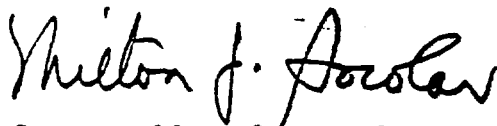
Accordingly, we sustain Litton's protest.

We note that this procurement is being conducted pursuant to OMB Circular A-109, Major Systems Acquisitions, in order to encourage maximum competition for further production of a wideband Klystron tube with an extended tuning range to be used in the next generation Weather Radar Program. Further, the RFP, as amended, provided for multiple awards. Therefore, we recommend that Commerce reevaluate, in accordance with our decision, Litton's proposal and consider whether an award to Litton would be advantageous to the government.

If it is determined that no award will be made to Litton, we recommend that every effort be made to have Litton considered in competitions for future production contracts for the wideband Klystron tube. Litton advises us that it is now developing the tube in-house. Accordingly, we see no reason why Commerce should not either consider the technical data generated by Litton in developing the tube or have Litton undergo validation testing of the developed tube at no cost to the government.

Since this decision contains a recommendation for corrective action to be taken, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committees on Government Operations and

Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720 (1982), which requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendation.

for 
Comptroller General
of the United States